Jus Post Bellum: An Interpretive Framwork

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I. Introduction

This paper outlines the interpretive principles of jus post bellum. Challenges and dilemmas common to the transition from conflict to peace (such as the "who," "when," and "why") require substantive norms arising from different areas of international law and practice to be interpreted and applied in a way that is unique to jus post bellum. This leads to the need for core principles that can be conceived of as "procedural" norms that provide guidance on "how" to interpret and apply substantive norms.

Applying international law in post-conflict settings poses a number of dilemmas, overlaps, and competing priorities.[1] For example, states are the primary subjects of international law, but many non-state actors need regulation in post-conflict situations that may not be adequately covered by domestic laws, for example because the domestic legislation has gaps, or is poorly or is un-enforced. Some of these norms may be transitional in nature—at different stages of the transition or once sustainable peace has been achieved, they may apply differently, or not at all. Other situations may call for balancing competing legal obligations. For example, peacebuilders[2] may find that they cannot fully protect human rights while also prioritizing peace and security.

[1] See e.g. James Gallen, "Jus Post Bellum: An Interpretive Framework" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**) 62 – 65.

[2] Such as international organizations, states, foreign states, NGOs and civil society working on peace issues.

The application of some laws—such as human rights laws—might prioritize individual protections while collective needs and rights are left unaddressed. International peacebuilders—such as the UN or foreign States—might struggle with the need to build institutions and protect rights while also respecting state sovereignty and self-determination. Furthermore, ensuring local ownership may mean different things in different contexts, and pose challenges in practice as there are no existing guidelines on how to operationalize it.[3] As described throughout this book looking at various case studies and areas of international law, norms applied in post-conflict contexts have unique characteristics, are context-specific and thus require regulatory flexibility.

The post-conflict situation—with its multiplicity of actors, their diverse goals and institutional practices—needs an interpretive framework to avoid the inconsistent or arbitrary application of the law.[4] Such a framework acts as a guide for decision-makers to adhere to a coherent set of principles, namely justice, fairness and procedural due process.[5] It can avoid fragmentation by making diverse areas of law coherent, interdependent components of the broader project of achieving sustainable peace and provides a mechanism for justifying choices and practices in pursuing the value goals of these different fields.[6] The jus post bellum framework can act provide such an interpretive guide and a set of coherent principles for practitioners in post-conflict settings. Research into the law and practice of peacebuilding and development in post-conflict settings reinforces this claim, and it forms a central part of the concept of jus post bellum presented in this book.

To function as a set of interpretive principles, jus post bellum should be considered as a broad, holistic concept that includes a spectrum of principles used to interpret a wide range of existing normative obligations applied post-conflict with the goal of promoting sustainable peace.[7] It should incorporate a broad concept of international law and should reflect its transformative function in post-conflict societies.[8] Rather than a set of "new" principles, *jus post bellum* principles can be found in other normative and legal frameworks—some originating in current bodies of international law, and others originating from the normative framework of non-state bodies. These include, inter alia, treaty obligations, customary international law, and soft law found in disparate legal frameworks, such as human rights, international humanitarian law,

[3] Gallen, "Jus Post Bellum: An Interpretive Framework" (n 1) 65.

[4] What Ronald Dworkin described as "checkerboard statutes," or those laws that treat matters of principle differently for arbitrary reasons in situations where justice may conflict with fairness. To overcome this, Dworkin proposes applying the concept of integrity. Ronald Dworkin, Law's Empire (Harvard University Press 1986) 178 – 86, 225.

[5] Gallen, "Jus Post Bellum: An Interpretive Framework" (n 1) 69 – 70; Ronald Dworkin, Law's Empire (Harvard University Press 1986) 225.

[6] Gallen, "Jus Post Bellum: An Interpretive Framework" (n 1) 70.

[7] Chapter 1.

[8] The "transformative" role of *jus post bellum* is a concept inherent in both legal and just war theory analyses of the concept as being a driver of peace, accountability, and societal reconciliation. See e.g. Larry May, "*Jus Post Bellum*, Grotius, and *Meionexia*" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**) 15. See also Gallen, "Jus Post Bellum: An Interpretive Framework" (n 1) 66 – 68, discussing how the areas of transitional justice, peacebuilding, security sector reform and development fall within the jus post bellum framework and which all strive to strengthen civic trust and the rule of law in their efforts to change post-conflict societies.

peace agreements, environmental law, property law, and others.[9] *Jus post bellum* also incorporates principles related to concepts such as democratic governance, transitional justice, and the responsibility to protect.[10] J*us post bellum* also includes principles drawing on informal arrangements, regulations for non-state actors, and other practices and sources of norms and governing power not typically encompassed under traditional understandings of "international law."[11]

This paper will analyze diverse sources of norms as they apply in post-conflict situations, how they apply to the specific needs that arise in these contexts, and areas where they may pose dilemmas for peacebuilders. This paper will closely examine cross-cutting challenges to *jus post bellum*, including human rights protections, self-determination, and the combined issues of sovereignty, consent, and trusteeship. In addition, it will explore how principles such as publicness, qualified deference, and proportionality act as core interpretive norms for jus post bellum.

II. International Law in Post-Conflict Settings: A Need for an Interpretive Framework

International law plays a central and expanding role in post-conflict transitions to peace.[12] International law can temper, regulate, legitimate, or undermine interventions in post-conflict societies and influence the course of events post-conflict.[13] However, the application of public international law is not straightforward in the post-conflict context. Although international law provides clear regulations on the use of force and conduct of parties during international and internal armed conflicts, no such specific legal rules apply to the post-conflict stage. Each context is unique and it may be unclear when international humanitarian law (IHL) ceases to apply, and therefore when its derogations are no longer allowed. The application of peacetime law is also complicated. In the aftermath of war, there may be difficulty ensuring compliance with international law and dealing with conflicts between laws and peacebuilding priorities. States—the primary subjects of public international law—may not have the capacity to adhere to their treaty obligations. For example, how can a state be accountable for protecting due process of law rights if its courts and legal institutions have been decimated? How can a state implement international law obligations when it lacks personnel or domestic expertise due to vetting or the context of the conflict?

This section introduces those sources of law most relevant to the transition from conflict to peace, distilled from a survey of treaties, peace agreements, literature, case studies, and

[9] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 8–10, discussing diversity of law-making approaches, and the political and contextual influence on choice of process.

[10] See e.g. Carsten Stahn, "R2P and Jus Post Bellum: Towards a Polycentric Approach" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**) 102; and Jens Iverson, "Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum: Outlining the Matrix of Definitions in Comparative Perspective" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**) 80.

[11] Benedict Kingsbury, "The Concept of "Law" in Global Administrative Law" (2009) 20 *European Journal of International Law* 26.

[12] See e.g. Kristen E. Boon, "The Future of the Law of Occupation" (2009) 47 *Canadian Yearbook of International Law* 107.

[13] Brett Bowden et al., "Introduction" in Brett Bowden, Hilary Charlesworth, and Jeremy Farrall (eds), *The Role of International Law in Rebuilding Societies* (Cambridge University Press 2009) 3, 7.

databases of pressing post conflict priorities. It is not comprehensive or a complete accounting of norms applicable in the jus post bellum conflict. Indeed, each conflict is distinct and raises unique legal questions that will draw on different legal norms. Therefore, the most relevant or applicable laws might change depending on the context. It raises some of the myriad complications that can result from the application of public international law during this transition. These jus post bellum dilemmas are expanded upon in Section III.

A. Treaties

Treaties are one of the primary sources of international law[14] and offer a rich source of norms that apply, within the constraints of ratification, during the transition from conflict to peace. Several treaties are directly applicable in post-conflict situations, although complications may arise.

For example, international humanitarian law treaties, such as the 1907 Hague Regulations and 1949 Geneva Conventions and their 1977 Additional Protocols, are directly relevant, insofar as they regulate the use and conduct of hostilities. These treaties may apply directly if there is an outbreak of fighting even after a situation is considered "post-" conflict.[15] Violations of these treaties may impact the development of peace agreements and priorities of international interveners embarking on peacebuilding projects. However, the application of IHL treaties may overlap in time with the application of other laws and norms applied during the transition to peace, including human rights law or international environmental law, which could lead to confusion or conflicts of laws.

Relevant human rights treaties include the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1966 International Covenant on Civil and Political Rights (ICCPR), as well as issue-specific treaties such as the 1979 Convention to Eliminate All Forms of Discrimination Against Women (CEDAW). However, requiring post-conflict States to fully adhere to human rights obligations when institutions may be decimated or destroyed may be unrealistic, even though derogations may not be allowed during peacetime. Other treaties that may be relevant to the peacebuilding phase, depending on the context and needs of the situation, include the 1998 Rome Statute of the International Criminal Court; international environmental law treaties; and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols.

1. UN Charter

One of the principal treaties applicable is the UN Charter, which provides the overarching framework for the UN to take necessary steps to end conflict and build sustainable peace. The UN Charter does not have any specific references to post-conflict peacebuilding, but as a living document, it allows the UN to take steps towards ending conflict and building peace. For example, the preamble declares the UN's commitment to maintaining international peace and security and to respecting human rights. It follows on this commitment to human rights and self-determination in Article 55. It calls for the respect of State sovereignty and non-interference

[14] Article 38, Statute of the International Court of Justice.
[15] CITE TO JPB BOOK ON POST.

with a State's internal affairs, two important jus post bellum concepts.[16] Another particularly relevant aspect of the UN Charter is the authority it gives the UN Security Council (UNSC)—including the UNSC's ability to make a determination on threats to or breaches of the peace or acts of aggression[17] and authorizes it to take non-military[18] and military[19] enforcement action. It also lays out the requirements for Member States to comply with and implement UNSC resolutions[20] and establishes the primacy of the UN Charter more generally.[21] Pursuant to the Charter, the UN has established a number of organs, policies, and programs directed at peacebuilding. Perhaps the most important in the context of jus post bellum is the Peacebuilding Commission.[22] These core aspects of the UN Charter will be discussed in more depth below and analyzed throughout the book.

i. Self-Determination

A discussion of the normative value of self-determination is important in the context of jus post bellum, as it highlights a significant dilemma for jus post bellumpost-conflict transitions to peace and emphasizes a need to fill gaps in current peacebuilding practice. Modern conflicts often have roots in grievances over self-determination.[23] This can manifest itself as rebel groups seeking to secede from a State, as demands for greater representation or participation in domestic politics, or accusations of injustice in the context of inequality or group discrimination and exclusion. However, self-determination—whether external or internal—is not frequently an explicit part of peacebuilding priorities, in theory, law, or practice. Self-determination may be superficially addressed by peacebuilders through a prioritization of national elections, but peacebuilding initiatives often lack a meaningful nexus with the need to foster a respect for self-determination in post-conflict societies. A focus on self-determination raises issues such as the legal status of new States, the collective rights of indigenous and local communities, and areas of developing rights that have emerged through peacebuilding practice. It also demonstrates the jus post bellum dilemma of protecting human rights while also respectingve State sovereignty.

According to Article 1(2) of the UN Charter, one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." Article 55 also references the right to self-determination, stating that friendly and peaceful relations between States "are based on respect for the principle of equal rights and

[16] Article 2 and Article 27, UN Charter.
[17] Article 39, UN Charter.
[18] Article 41, UN Charter.
[19] Article 42, UN Charter.
[20] Article 25; Article 48, UN Charter.
[21] Article 103, UN Charter. It provides that States' obligations under the UN Charter take precedence over other international obligations (except jus cogens), solidifying the primacy of the Charter in international legal matters.
[22] UNGA Resolution Adopted by the General Assembly on 20 December 2005, A/RES/60/180; UNSC Resolution 1645 (2005), S/RES/1645 (2005).
[23] For example, the conflicts in Kosovo, Sri Lanka, and South Sudan all related to clashes between the principle of territorial integrity and the right to self-determination. Louise Arbour, "Self-Determination and Conflict Resolution: From Kosovo to Sudan," September 22, 2010 (Speech by Louise Arbour, President and CEO of the International Crisis Group to the Carnegie Council for Ethics in International Affairs, 22 September 2010).

self-determination." Self-determination has evolved over time into two distinct legal concepts, "external" and "internal" self-determination.

Self-determination emerged as a legal right during the period of decolonization and was linked to the concept of a State. It was used as a tool by colonized people during struggles for independence of colonized territories. The UN's 1960 Colonial Declaration (Declaration 1514) states that "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[24] Ten years later, the Friendly Relations Declaration (Declaration 2625) provided that this right could be exercised through the creation of an independent sovereign state, the free association or integration with another State, or "any other political status freely determined."[25] This choice should be free, voluntary, and "expressed through informed and democratic processes."[26] However, this right was subject to the pre-existing territorial integrity of the state.[27] This type of self-determination is known as "external self-determination."

Although the norm was primarily applied to situations of decolonization, there have been exceptions.[28] Declaration 2625 also provides that self-determination requires "a government representing the whole people belonging to the territory without distinction as to race, creed or color."[29] It has been invoked by some to argue for applying the right to self-determination to certain oppressed groups within State territories.[30]

This position is quite controversial[31] and is relevant to jus post bellum in certain contexts. Most secessionist groups claim a lack of equal representation and declare the need for secessiona separate State. This puts self-determination grievances at the center of many conflicts, which

[24] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Resolution 1514 (XV) of 14 December 1960, Art. 2.

[25] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (IIV) of 24 October 1970.

[26] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (IIV) of 24 October 1970, Principle VII. See also International Court of Justice, Western Sahara, Advisory Opinion of 16 October 1975, ICJ Reports 1975, para 59 (stating that self-determination should be understood as "the need to pay regard to the freely expressed will of peoples.").

[27] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Resolution 1514 (XV) of 14 December 1960, Art. 6; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (IIV) of 24 October 1970, Principle VII.

[28] See, e.g., James Crawford, The Creation of States in International Law (CUP 2006), 374 – 448.

[29] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Resolution 1514 (XV) of 14 December 1960, Art. 6; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (IIV) of 24 October 1970, Principle VII.

[30] See, e.g., Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP 1995), 109 – 115; H. Gross Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions, UN Publication, Sales No. E/79.XIV.5 (1979) para 60; see also Cedric Ryngaert and Christine Griffioen, "The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers" (2009) 8 Chinese Journal of International Law 573.

[31] See, e.g., Peter Hilpold, "The Kosovo Case and International Law: Looking for Applicable Theories" (2009) 8 Chinese Journal of International Law 55.

has distinct repercussions in the peacebuilding context. It permeates questions over the legal status of new secessionist governments as well as practical peacebuilding considerations.

For example, Kosovo unilaterally declared its independence from Serbia in February 2008 while it was under the UN territorial administration, UNMIK. In addition to raising questions over the legality of the declaration of independence, the act and the new Kosovo Constitution required a significant modification of the UNMIK mandate and the introduction of a more significant role by the European Union (EULEX).[32] In its Advisory Opinion on the matter, the ICJ stated: "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation."[33] However, while the ICJ did not resolve the question the right of self-determination for secessionist groups, it ruled that the act of declaring independence was not forbidden by international law.[34] However, tThe issue remains unclear and there is tension between the right of self-determination's commitment to self-government and the territorial integrity of States.[35]

"Internal self-determination" is another way of conceptualizing the right. This type of self-determination refers to the right of a people inside a State territory to freely choose a political and economic system.[36] This is an ongoing choice, and relates also to the right to determine their social and cultural development.[37] Article 1(1) of the ICCPR and the ICESCR provide that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This right is central to jus post bellum. As will be discussed throughout the book, it plays a key role in determining not only the priorities and actions of intervenerspeacebuilders, but also relates to ways in which interventions and peacebuilding initiatives fall short—in particular with regard to the exclusion of various peoples and communities in the development and execution of these priorities and programs.[38]

The UN Human Rights Committee has explicitly stated that parties to the ICCPR and ICESCR have obligations under Article 1 to establish political and constitutional processes that "in practice allow the exercise" of the right to self-determination.[39] This means that in practice, states States

[32] UNSC Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 24 November 2008, S/2008/692; see also UNMIK Background, available at http://www.un.org/en/peacekeeping/missions/unmik/background.shtml (accessed August 15, 2014).
[33] International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports 2010, para 79.
[34] International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports 2010, para 79. But see Kosovo Advisory Opinion, Separate Opinion of Judge A. A. Cançado Trindade (discussing remedial succession in the context of gross and historical human rights violations.).
[35] Bell, *Lex Pacificatoria* (n **Error! Bookmark not defined.**) 37.
[36] Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (CUP 1995), 101.
[37] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994), 120.
[38] See, for example, the discussion of the importance of inclusion in drafting constitutional peace agreements in Chapter 3, and the requirement to consult with indigenous communities with respect to natural resource extraction in Chapter 6.
[39] General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its 21st session, 13 March 1984, OHCHR, para 3; Guidelines for the treaty-specific

must instill policies that allow for the protection of the right to self-determination. Specifically, this includes "The the extent to which indigenous and local communities are duly consulted, and whether their prior informed consent is sought in any decision-making processes affecting their rights and interests under the Covenant[s]."[40] Merely including reference to election laws in States parties' reports is insufficient, according to the Human Rights Committee.[41] States must also report on how it recognizes and protects the rights of "indigenous communities, if any, to ownership of the lands and territories which they traditionally occupy or use as traditional sources of livelihood."[42] The Human Rights Committee can in turn evaluate these policies under its mandate to review reports submitted by States parties.

The general comments and recommendations adopted by human rights treaty bodies also explicitly notes that this obligation to protect peoples' right to self-determination is not limited to the people of the State party. Rather, it extends to all peoples. The Committee considered that Article 1(3) of the ICCPR:

> "[I]mposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. […] The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination."[43]

This could arguably create an obligation on behalf of international interveners actors in post-conflict situations to take positive action to protect the right to self-determination, to the extent that the intervening party is subject to the ICCPR and ICESCR. This obligation also requires respect for the internal affairs of other States and avoiding adversely affecting the peoples'

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document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/2009/1 of 22 November 2010, under Art. 1.

[40] Guidelines for the treaty-specific documents to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/2009/1 of 4 October 2010, para 28; Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2008/2 of 24 March 2009, para 8.

[41] Compilation of general comments and general recommendations adopted by human rights treaty bodies, UN Doc. HRI/GEN/1/Rev.9 (vol. I) of 27 May 2008; pg. 183.

[42] Guidelines for the treaty-specific documents to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/2009/1 of 4 October 2010, para 28; Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2008/2 of 24 March 2009, para 8.

[43] Compilation of general comments and general recommendations adopted by human rights treaty bodies, UN Doc. HRI/GEN/1/Rev.9 (vol. I) of 27 May 2008; pg. 183-4.

ability to exercise their right to self-determination. It therefore demonstrates the jus post bellum dilemma of taking positive action to protect rights while respecting state State sovereignty and employing inclusive practices.

Self-determination extends to other developing rights relevant to jus post bellum. Christine Bell argues that "a series of international law developments, […] largely initiated as a response to intrastate conflicts, now underwrite a requirement for states to work to accommodate minorities that lose out in majoritarian conceptions of democracy."[44] Other emerging standards address the increased participation of women, victims of international crimes, indigenous peoples and minorities, and other marginalized groups in legal processes that affect their interests.[45]A discussion of the normative value of self-determination is important in the context of jus post bellum, as it highlights a significant dilemma for jus post bellum and emphasizes a need to fill gaps in current peacebuilding practice. Modern conflicts often have roots in grievances over self-determination.[46] This can manifest itself as rebel groups seeking to secede from a State, as demands for greater representation or participation in domestic politics, or accusations of injustice in the context of inequality or group discrimination and exclusion. However, self-determination—whether external or internal—is not frequently an explicit part of peacebuilding priorities, in theory, law, or practice. Self-determination may be superficially addressed by peacebuilders through a prioritization of national elections, but peacebuilding initiatives often lack a meaningful nexus with the need to foster a respect for self-determination in post-conflict societies. A focus on self-determination raises issues such as the legal status of new States, the collective rights of indigenous and local communities, and areas of developing rights that have emerged through peacebuilding practice. It also demonstrates the jus post bellum dilemma of protecting human rights while also respective State sovereignty.

ii. Sovereignty, Consent & Trusteeship

Peacebuilders face a dilemma challenge in ensuring human rights protections and the right to self-determination while also respecting the sovereignty of the post-conflict State. This is a core dilemma of jus post bellum: how can interveners balance a respect for sovereignty and the principle of non-interference in State affairs while also protecting individual and collective rights? This section will discuss the development of the concept of sovereignty, the consequences of consent (or lack thereof) in international interventions, and the idea of international actors serving as "trustees" in the post-conflict period.

[44] Bell, *Lex Pacificatoria* (n **Error! Bookmark not defined.**) 222.

[45] Bell, *Lex Pacificatoria* (n **Error! Bookmark not defined.**) 223; Alan Boyle and Christine Chinkin, The Making of International Law (OUP 2007) 41 – 97. For example, UN Security Council Resolution 1325 (2000) "Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict." UNSC Res 1325 (2000) of 31 October 2000, para 1. See also UNSC Resolution 1889 (2009) of 5 October 2009 and UNSC Resolution 2122 (2013) of 18 October 2013.

[46] For example, the conflicts in Kosovo, Sri Lanka, and South Sudan all related to clashes between the principle of territorial integrity and the right to self-determination. Louise Arbour, "Self-Determination and Conflict Resolution: From Kosovo to Sudan," September 22, 2010 (Speech by Louise Arbour, President and CEO of the International Crisis Group to the Carnegie Council for Ethics in International Affairs, 22 September 2010).

Article 2(1) of the UN Charter proclaims that "The Organization is based on the principle of the sovereign equality of all its Members." Sovereignty is a core principle of international law, and has been since the start of the modern conception of international law with the Treaty of Westphalia.[47] The centrality of sovereignty to international relations and international law was later re-affirmed and extended to *all* States in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. According to Antonio Cassese, "sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest."[48] Sovereignty includes broad powers and rights of States, the most quintessential of which are the power to wield authority over all individuals living within the State and sovereign equality among States.

Sovereignty is a malleable concept and has evolved to accommodate a growing focus in international law on the individual and individual human rights.[49]

As stated by former UN Secretary General Kofi Annan:

> "[S]tate sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."[50]

This sentiment has been mirrored by the proliferation of international obligations that regulate the conduct of States in their external and internal relations.[51] Indeed, sovereignty implies a

[47] Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty" (1999) 21 The International History Review 569.

[48] Antonio Cassese, *International Law* (2ed OUP 2005), 48.

[49] Anne Peters, "Humanity as the A and Ω of Sovereignty," 20 European Journal of International Law 513 (2009), 514. Some may argue that sovereignty has been contested, rather than has evolved, as a result of the increasing focus on the individual. See, for example, Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) and A. A. Cançado Trindade, *International Law for Mankind: Towards a New Jus Gentium* (Martinus Nijhoff 2010). See also, Ruti Teitel, *Humanity's Law* (OUP 2011).

[50] Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, September 16, 1999. See also Press Release, UN Secretary-General Kofi Annan, Address Before the Commission on Human Rights in Geneva, Switzerland, SG/SM/6949 HR/CN/898 (April 7, 1999), in which Annan states "emerging slowly but […] surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty." A similar sentiment is reflected in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Tadić* case, the Appeals Chamber held that "a state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach." *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), Appeals Chamber, ICTY, para 97.

[51] José E. Alvarez, State Sovereignty is Not Withering Away: A Few Lessons for the Future, in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 30; Dov Jacobs, Targeting the

responsibility to protect individuals and is the foundation of the doctrine of the Responsibility to Protect (R2P).[52] R2P is founded on the protection of populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and offers a human rights centered view of sovereignty.[53]

There is also debate about the relationship between sovereignty and self-determination, in particular with regards to the conditions of statehood after a secessionist group exercises its right to self-determination. The criteria for recognition of formal statehood were established by the Montevideo Convention and the Rights and Duties of States,[54] but some have argued that they have developed to include other criteria such as the respect of human rights and democracy.[55] These considerations become more complicated in the post-conflict context, especially when post-conflict States may have been complicit in massive abuses of human rights and/or has have collapsed institutions.

Another central tenet of international law, as articulated in Article 2(7) of the UN Charter, is the principle of non-intervention in the affairs of other statesStates. This longstanding principle prohibits a State from interfering in how a foreign State is internally organized. This relates to the institutional competence of foreign governments, pressuring or interfering in the operation of national bodies (such as the judiciary or legislature). Under Artice 2(7), also means that State consent is required for UN and other peacebuilding activities to be carried out on a State's territory. If permission to intervene is given voluntarily, the state and the UN will sign a Status of Mission Agreement (SOMA) that will outline the technical terms and conditions of UN intervention in the country. In other cases, intervention can be based on a UNSC Chapter VII resolution.[56] This can be an important tool if there is no clear state authority following armed

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State in Jus Post Bellum: Towards a Theory of Integrated Sovereignties, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), Jus Post Bellum: Mapping the Normative Foundations (OUP 2014), 421.

[52] Peters, (n **Error! Bookmark not defined.**) at 522 – 23. See also Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" (2007) 101 American Journal of International Law 99.

[53] Resolution adopted by the General Assembly, World Summit Outcome, UN Doc. A/RES/60/1 of 24 Oct. 2005, at para. 138 ("Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.")

[54] Montevideo Convention on the Rights and Duties of States (adopted 26 December 33, entered into force 26 December 1934) 165 LNTS 19, Article 1.

[55] Matthew Craven, 'Statehood, Self-Determination, and Recognition," in Macolm D. Evans (ed), *International Law* (OUP 2010) 232-235; see also Jure Vidmar, *Democratic Statehood in International Law* (Hart 2013) 83-85.

[56] See, for example, the Sierra Leone Lomé Peace Agreement, July 1999. The Government of Sierra Leone and the RUF agreed to expand the peacebuilding role of ECOWAS, ECOMOG and UNOMSIL/UNAMSIL; UNSC Res. 1260 (1999) of 20 August 1999 re: Lomé Peace Agreement; and the Declaration of Independence by the Assembly of Kosovo of February 2008, in which it "clearly, specifically, and irrevocably" affirmed that Kosovo would be legally bound to comply with the Ahtisaari Plan, and invited the UNMIK and EULEX and NATO to supervise and assist the implementation of the plan. Some have argued that the UNSC has developed a new model of multi-lateral occupation by merging structures of belligerent occupation with its Chapter VII peacemaking mandate to facilitate reconstruction and collective security. Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective" (2003) 1 *Israel Defense Forces Law Review* 23; Carsten Stahn, ""Jus ad

conflict, if additional military or security measures are needed, or if a State withdraws its consent for intervention or that consent becomes invalid. If neither of these two situations apply, the state can formally delegate rights to the intervenersinternational actors.

In the jus post bellum context, foreign States and international organizations often intervene in post-conflict States to help rebuild government institutions. Indeed, the UN has played an increasingly central role in addressing post-conflict questions of sovereignty, including the realization of self-determination, and to a certain extent, the recognition of statehood.[57] International interveners actors also influence the development of constitutions, legislation, government structures, and more. There is therefore a careful balance between interventions that are invited and welcomed by the host State and those that might violate the principles of sovereignty and non-interference. This dilemma is particularly acute when post-conflict States are at or near collapse, or when territorial administrative bodies are imposed by the UN, such as in Kosovo and East Timor. While interventions focus on strengthening the State, they also focus on protecting the rights of individuals and addressing past and future human rights abuses. Interveners Peacebuilders must consider how to balance the need for respecting the principles of sovereignty and non-interference while upholding human rights. What are the legal obligations of international intervenersactors, whether States or international organizations, in this context? Can or should sovereignty be constrained during the jus post bellum phase?

While there might be a tendency to reduce the importance of sovereignty in post-conflict states given the seemingly all-encompassing priorities of peacebuilding immediately post-conflict, sovereignty still plays a key role in the development of sustainable peace. Firstly, and pragmatically, the UN, foreign States, and NGOs cannot fulfill the role of state institutions *ad infinitum*. There are resource limitations to the work they can do, in addition to shifts in policy and foreign relations priorities that limit states' States' interest in certain interventions. Secondly, and as will be discussed further throughout the book, developing the capacity of a sovereign state State that can effectively regulate its own internal and external relations—including protecting human rights and the right to self-determination—is key to sustainable peace.

In the jus post bellum context, respecting sovereignty means respecting self-determination and protecting individual rights. The principle of self-determination itself requires that interveners allow peoples sovereignty in their State affairs, and implies the obligation for interventions to be inclusive and culturally and contextually relevant. As Martti Koskenniemi has argued:

> "Sovereignty expresses frustration and anger about the diminishing spaces of collective re-imagining, creation and transformation of individual and group identities by what presents themselves as the unavoidable necessities of a global modernity. Against those, sovereignty articulates the hope of experiencing the thrill of having one's life in one's own hands. This is what

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bellum, "jus in bello" … "jus post bellum"? – Rethinking the Conception of the Law of Armed Force," in 17 European Journal of International Law 921.

[57] As can be seen in particular by the UN territorial administrations in Kosovo and East Timor, and Palestine's efforts to gain recognition in various international organizations. See generally Carsten Stahn, *The Law and Practice of International Territorial Administration* (CUP 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission never Went Away* (OUP 2008).

> sovereignty meant for those who struggled against theocratic rule in early modern Europe or invoked it to fight for decolonization in the twentieth century. Today, it stands as an obscure representative of an ideal against disillusionment with global power and expert rule. In the context of war, economic collapse, and environmental destruction, in spite of all the managerial technologies, sovereignty points to the possibility, however limited or idealistic, that whatever comes to pass, one is not just a pawn in other people's games but, for better or for worse, the master of one's life."[58]

Sovereignty becomes then rooted in the concept of "self-hood" and ultimately, self-determination.

However, in general and during the peacebuilding phase especially, the capacity to enjoy the "thrill" of sovereignty and to be the "master of one's life" is not evenly distributed.[59] Spoilers and warlords take advantage of fragile post-conflict contexts; politicians seek to entrench their power; international interveners are constrained by time and resources and often focus their efforts on capital cities or populous regions and neglect rural or distant locales. Also, States generally lack the basic capacity to allow citizens to participate in their own sovereignty. As a consequence, international interveners adopt many of the functions traditionally relegated to the State.

Some argue that this means interveners international actors can occupy sovereign territories based on the concept of "trusteeship" for the population, "transforming the constitutional order in view of the common good"[60] and on the basis of a neutral set of cosmopolitan governance norms that become equated with sovereignty.[61] Others have suggested this situation leads to a "fragmented"[62] or "fuzzy"[63] sovereignty, and suggests the need for a reconceptualization of sovereignty in the jus post bellum context. For example, Dov Jacobs suggests a model of "integrated sovereignties" for jus post bellum, in which the interests of States and the international community are combined and exercised in various sovereignties that overlap and interact. These arguments demonstrate some of the complex dilemmas that arise during the transition from conflict to peace, when long-standing normative frameworks need to be re-conceptualized and applied in a way that supports the overall goal of sustainable peace.

iii. UN Security Council Resolutions

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[58] Martti Koskenniemi, What Use for Sovereignty Today? 1 Asian Journal of International Law 70 (2011).

[59] José E. Alvarez, State Sovereignty is Not Withering Away: A Few Lessons for the Future, in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 37.

[60] Martti Koskenniemi, What Use for Sovereignty Today? 1 Asian Journal of International Law 61, 64 (2011).

[61] Carsten Stahn, The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond (Cambridge: Cambridge University Press, 2008) at 760–2.

[62] Nir Gazit, 'Social Agency, Spatial Practices, and Power: The Micro-foundations of Fragmented Sovereignty in the Occupied Territories" (2009) 22 International Journal of Politics, Culture, and Society 83.

[63] Christine Bell, "Peace Settlements and International Law: From *Lex Pacificatoria* to *Jus Post Bellum*" in Nigel D. White and Christian Henderson (eds), *Research Handbook On International Conflict And Security Law* (Edward Elgar 2013).

UN Security Council Resolutions are another important source of jus post bellum normsprinciples.[64] The decisions most relevant for jus post bellum include those passed under Chapter VII of the UN Charter, which regard relate to threats to the peace, breaches of the peace, and acts of aggression. The UNSC has wide discretion in determining threats to the peace, even in areas traditionally considered as falling under domestic jurisdiction.[65] This includes the authority to "fill governance gaps, to replace existing governmental institutions or to shape the internal political organization of a territorial entity […] providing that the measures of the Council itself are temporary in nature and applied in accordance with the constraints binding the Council under Article 24(2) of the Charter and general international law."[66] In the post-Cold War period and since the mid-1990s, the UNSC has developed a positive conception of peace.[67] It has also broadened its concept of "security," as can be seen from thematic issues addressed by the UNSC agenda such as "women, peace and security," "human rights," and "justice, rule of law and impunity," amongst others.[68] The UNSC has been very active in making declarations and resolutions on issues relating to jus post bellum, such as the rule of law, democratic principles and human rights.[69]

Article 25 of the Charter requires members of the UN to "accept and carry out" UNSC decisions.[70] They take priority over other conflicting international law obligations, as stated in Article 103 of the UN Charter. Not only can UNSC decisions bind States, but can also bind, albeit sometimes indirectly, non-state actors such as international organizations, companies, and non-

[64] James Gallen, "*Jus Post Bellum*: An Interpretive Framework" in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), Jus Post Bellum: Mapping the Normative Foundations (OUP 2014)(n 1) 62.

[65] Article 41 of the UN Charter provides the UNSC authority to intervene in matters falling under the domestic jurisdiction of a State, including economic and diplomatic relations, if required to maintain or restore international peace and security. UN Charter, Article 41.

[66] Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles and Beyond, Cambridge* (CUP 2008) 428.

[67] Carsten Stahn, "Jus Post Bellum: Mapping the Discipline(s)," in Carsten Stahn and Jan K. Kleffner (eds), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 100.

[68] See, e.g., http://www.securitycouncilreport.org/thematic-general-issues.php (accessed July 31, 2014).

[69] See, e.g., UNSC Declaration on strengthening the Effectiveness of the Security Council's Role in Conflict Prevention, Particularly in Africa, Res. 1625 (2005) 14 Sept. 2005, Annex; and UN Doc. S/PRST/2005/30, 12 July 2005.

[70] However, not all UNSC resolutions are binding for UN members. Only "decisions" of the UNSC are legally binding on UN members. Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ," 16(5) European Journal of International Law 879, 884 (2006), citing Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK), Preliminary Objection [1998] ICJ Rep 9, para. 44 (on the non-binding nature of UNSC recommendations); Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep 174, at 178; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 [1971] ICJ Rep 16, at para. 115. When it is not clear whether a UNSC paragraph is a binding decision, the ICJ has held that a determination must be made "in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked, and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council. International Court of Justice, Legal Consequences for States of the Continued Presence of South African in Namibia (West South Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, para 114. See also, International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Reports (2010), para 94.

state armed groups.[71] That makes UNSC resolutions broadly relevant for the jus post bellum context, which involves a multitude of non-state actors.

2. Human Rights

The UN Charter was established on the basis of "faith in fundamental human rights" and is committed to protecting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[72] The 1948 Universal Declaration of Human Rights demonstrates the encompassing reach of human rights principles, recognizing "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[73] Human rights law has broad reach and influence even though States can avoid the binding nature of human rights law[74] through exercising their right to refuse to join voluntary treaty regimes; entering reservations understandings and declarations to those treaties to which they do contract themselves; or binding themselves in a treaty with another State that deviates from, and will prevail over, rules of customary international law.[75]

Human rights law has developed over time to become a core part of international law as a whole and thus is an essential aspect of jus post bellum.[76] Human rights obligations touch on nearly every aspect of peacebuilding, from self-determination to rule of law to environmental protections. Jus post bellum interpretive principles draw on human rights laws and principles to help shift interpretation of laws in other fields to ensure respect for human rights, including economic, social and cultural rights. Human rights law also poses many dilemmas for the post-conflict context including the challenge of whether to prioritize human rights over other pressing issues, such as security; the challenge of protecting both individual and collective rights; protecting economic, social and cultural rights in a way sensitive to context-specific local preferences; and how to ensure that non-state actors and international peacebuilders are held accountable for human rights violations.[77] The application of human rights law and the challenges this poses during the transition from conflict to peace will be discussed throughout the book.

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[71] See, e.g., UNSC Resolution 811 (1993) 12 March 1993 (in which the UNSC demands that UNITA, a party to the conflict, "accept unreservedly the results of the democratic elections of 1992 and abide fully by the Acordos de Paz."); and SC Res 1127 (1997), 28 August 1997. See also Daniëlla Dam-de Jong, "Standard Setting Practices for the Management of Natural Resources in Conflict-torn States: Constitutive Elements of Jus Post Bellum?" in Carsten Stahn, Jens Iverson and Jennifer S. Easterday (eds) *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles and Practices* (OUP, forthcoming).

[72] UN Charter, Preamble and Art. 55(c).

[73] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) Preamble.

[74] Except those which are *jus cogens*.

[75] See, e.g., Gregory H. Fox, Navigating the Unilateral/Multilateral Divide in Stahn et al (n 1), 229, 235 - 243.

[76] For example, human rights is referenced extensively by authors in Stahn et al, (n 1).

[77] Christine Min Wotipka and Kiyoteru Tsutsui, Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001, 23 Sociological Forum 724 (2008) (on broad influence of human rights); Johan D. van der Vyver, "Sovereignty," in Dinah Shelton (ed) *International Human Rights Law* (OUP 2013), 379, 395 (on methods for avoiding binding nature of human rights laws).

B. Customary International Law

Customary international law is also a relevant source of norms for jus post bellum. It has broad applicability, including in post-conflict situations where other bodies of law might be more difficult to apply. In addition, customary international law operates in situations of legal uncertainty, such as the immediate aftermath of armed conflict. Moreover, it provides a way to identify the development of new international laws that are particular to the jus post bellum context based on the behavior of States and international organizations post-conflict.

Customary international law refers to "those rules of international law that derive from and reflect a general practice accepted as law."[78] Customary international law can bind all States, regardless of whether they are party to any treaty. Although there are exceptions to this broadly binding power of customary international law, including where a State has objected to being bound by a developing norm of customary international law,[79] it is applicable to a majority of States and, in some cases, other actors such as non-state armed groups and international organizations as well.[80] Moreover, customary international law is applicable in situations of legal uncertainty such as conflict or post-conflict situations—for example, the International Law Commission has implied that customary international law continues to apply even if treaties are suspended as a consequence of armed conflict.[81]

Customary international law is also relevant to jus post bellum in that it creates a link between the behavior of States and IOs and developing legal norms. To determine the existence of a rule of customary international law, Article 38(1)(b) of the Statute of the ICJ requires "evidence of a general practice accepted as law." The International Law Commission provides a similar approach, stating that "to determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is general practice accepted as law." [82] There must be evidence of established State practice and *opinio juris*.

The ICJ has held that the State practice does not need to involve acts that are "in absolutely

[78] Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (65th Session 2014), GA A/CN.4/672, para 20.

[79] Yoram Dinstein, "The Interaction Between Customary International Law and Treaties," 322 Recueil des Cours 284-287 (2006).

[80] Anthea Roberts and Sandesh Sivakumaran, Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, 37 Yale Journal of International Law 107, 108 (2012) (noting the expansion of IHL to include regulation of state and non-state actors in non-international armed conflicts); Kristen E. Boon, Jus Post Bellum in Non-International Armed Conflicts, in Stahn et al. (n 1) 259, 264 (stating that international organizations such as the UN and the World Bank must "abide by customary international law and other treaties to which they are a party."). However, this application may be quite narrow; it is unclear, for example, whether customary international law relating to human rights could apply to non-state actors or international organizations. Gregory H. Fox, Navigating the Unilateral/Multilateral Divide in Stahn et al (n 1), 229, 239.

[81] UNGA A/RES/66/99, "Effects of Armed Conflict on Treaties" (2011) Article 10 "The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty."

[82] Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (65th Session 2014), GA A/CN.4/672, para 31.

rigorous conformity with the rules" but simply requires consistency with the rules.[83] If a State appeals "to exceptions or justifications within the rule itself" to explain its non-conformity with the rule, that in turn confirms the existence of the rule.[84] A report by the International Law Commission (ILC) concluded that indicators of state practice include "the conduct of States 'on the ground,' diplomatic acts and correspondence, legislative acts, judgments of national courts, […] practice in connection with treaties, and acts in connection with resolutions of organs of international organizations and conferences."[85] Inaction may indicate practice, as well as the acts and inactions of international organizations, the ILC concluded.[86] This provides several avenues for identifying developing customary international law norms in post-conflict situations, as State practice is broad and can be found in diplomacy in the course of peace negotiations (by all States and international organizations involved), the passage of new domestic legislation, agreements with international organizations, and other actions by States (including the post-conflict State itself as well as others involved in the transition to peace) and international organizations can be considered state practice.[87]

According to the ICJ, opinio juris requires that States act according to a belief that they are "applying a mandatory rule of customary international law."[88] If a State's acts are attributable to its belief that it is acting according to its treaty obligations or international policy, this would not count as evidence of customary international law.[89] Voluntary agreements or acts conducted by States to honor their political commitments—common especially to international actors and foreign States in post-conflict situations—would not constitute evidence of customary international law. However, although potentially difficult to establish, the actions of states in the peacebuilding context may indicate emerging customary international law norms. For jus post bellum, this could provide a source of potentially new principles

[83] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of June 27, 1986, ICJ Reports para 186.
[84] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of June 27, 1986, ICJ Reports para 186.
[85] Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (65th Session 2014), GA A/CN.4/672, para 48.
[86] Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (65th Session 2014), GA A/CN.4/672, para 48.
[87] Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (65th Session 2014), GA A/CN.4/672, para 48.
[88] International Court of Justice, The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, para 76.
[89] International Court of Justice, The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, paras 71 – 76 (on treaty obligations); International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, ICJ Reports 1986, para 109 (where the Court contrasted "statements of international policy" from "an assertion of rules of existing international law");

C. Principles of International Law

As an interpretive framework, jus post bellum relies on "procedural" norms that can 1) regulate how to go about peacebuilding and 2) serve as an interpretive tool to help practitioners understand how best to interpret and apply laws and norms to promote a more sustainable peace. In this sense, it also draws on principles of international law as part of its normative content. For example, as discussed in depth below, the principles of publicness and proportionality are particularly relevant to jus post bellum. These and other principles such as sustainability and contextualism, constitute some of the interpretive principles of jus post bellum.

It is important to distinguish these principles from the "general principles of international law" articulated by Article 38(1)(c) of the Statute of the ICJ as a source of international law. The ICJ uses "general principles of international law" when it cannot otherwise find an explicit rule in either treaty law or customary international law or as an aid in interpreting provisions of the law. "General principles" are typically very broad and can be abstract compared to specific rules found in other sources of law. Principles are important but also can be unclear, as they have a fluid normative quality. They are derived from legal principles common to national legal systems;[90] those principles inherent to "law" itself;[91] and fundamental principles to the international legal community.[92] There are two distinct classes of general principles: general principles of international law which are inferred or deduced by generalization from rules of international law (such as treaties or customary international law); and general principles related to specific bodies of international law, such as humanitarian law, State responsibility, environmental law, etc., which are principles that pertain to the whole body of that area-specific law. General principles have several functions, including unifying disparate areas of law,[93] filling gaps in international law,[94] an interpretation aid,[95] and helping develop international law.[96]

The principles outlined in this book can play similar roles. They can help bring together disparate areas of law applied during post-conflict phases, such as IHL, human rights law, international criminal law, environmental law, property law, and others. Moreover, they can help fill gaps

[90] Sean D Murphy, *Principles of International Law*, 2d (St Paul MN: Thomson Reuters, 2012) at 101; Gideon Boas, *Public International Law: Contemporary Principles and Practices* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) at 107-108; Bassiouni, M Cherif. "A Functional Approach to "General Principles of International Law" (1989-1990) 11 Mich J Int"l L 768 at 771.

[91] Sean D Murphy, *Principles of International Law*, 2d (St Paul MN: Thomson Reuters, 2012) at 102.

[92] Gideon Boas, *Public International Law: Contemporary Principles and Practices* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) at 107. *Prosecutor v Kupreskic et al (Trial Judgement)*, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 January 2000, available at http://www.refworld.org/docid/40276c634.html at §591.

[93] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1991) at 1 – 2.

[94] Bassiouni, M Cherif. "A Functional Approach to "General Principles of International Law" (1989-1990) 11 Mich J Int"l L 768 at 791-792.

[95] Bassiouni, M Cherif. "A Functional Approach to "General Principles of International Law" (1989-1990) 11 Mich J Int"l L 768 at 776; *Prosecutor v Furundzija (Trial Judgement),* IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998 **(at 183).**

[96] Bassiouni, M Cherif. "A Functional Approach to "General Principles of International Law" (1989-1990) 11 Mich J Int"l L 768 at 777-778.

where these different bodies of law do not address a particular dilemma. The principles can also help interpret different areas of law, especially where they might overlap or where a deviation from the "standard" application of the law might be in order due to the particularities of post-conflict dilemmas. Finally, the principles outlined in this book can help develop new norms or rules of international law, as they are adopted by States and other peacebuilders. The principles discussed, however, are not meant to be considered "general principles of international law," although some might also fit that category. They derive their authority from different fields of law, but also from scholarly work in various disciplines and the experience of practitioners on the ground. Therefore, some principles articulated below might be recognized as such in the international community; others may be "new" or developing principles. They are by nature more general than specific rules,[97] but may form the basis for the articulation of more detailed obligations and rights as jus post bellum develops. These principles of jus post bellum can help make connections between the law and practice of peacebuilding across fields and disciplines.

D. Soft Law Norms

Soft-law, or law that does not have binding legal effect,[98] is another source of norms relevant to *jus post bellum*. It can be used to interpret or clarify treaty norms or other sources of hard law. Moreover, in the post-conflict phase, where there is a great deal of legal uncertainty, soft-law has an increased importance for providing a normative framework where "hard" laws might be absent or lacking. Although they do not demonstrate opinio juris, soft-law standards demonstrate norms and practices considered important in the peacebuilding context. They can be an indication of developing "hard" international legal norms, in particular through the non-binding voluntary norms adopted by States. With the growth of the peacebuilding field since the 1990s and the proliferation of various practices, approaches and normative frameworks applied in different post-conflict situations, this role of soft-law should not be underestimated.

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[97] See, e.g., International Law Association, Final report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, London Conference (2000), pg. 11. Ronald Dworkin describes the difference between rules and principles as ""Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision [...] But this is not the way [...] principles [...] work. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met [...] Principles have a dimension that rules do not - the dimension of weight or importance. When principles intersect [...] one who must resolve the conflict has to take into account the relative weight of each [...] Rules do not have this dimension." Ronald Dworkin, *Taking Rights Seriously*, 24f (1978).

[98] The "soft" or "hard" nature of various norms and the role of soft-law in general has been the subject of significant academic debate, over issues such as the nature of non-binding agreements or their value within the international legal order. H. Hellgenberg, "A Fresh Look at Soft Law," 10 European Journal of International Law 499 – 515 (1999); John J. Kirton and M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004); Jaye Ellis, 'shades of Grey: Soft Law and the Validity of Public International Law," 25 Leiden Journal of International Law 313 (2012); Mattias Goldmann, "We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law," 25 Leiden Journal of International Law 335 (2012); Jan Klabbers, "The Redundancy of Soft Law," 65 Nordic Journal of International Law 167 (1996).

Soft-law can take many forms, but for this study, the most relevant include the principles and standards articulated in non-binding documents adopted by States or others with the intention of influencing State behavior.[99] One significant source of soft-law norms are non-binding declarations adopted by States in international organizations, such as UN General Assembly resolutions, treaty bodies, or other international conferences. Some examples relevant for jus post bellum include General Comments and case law of human rights treaty bodies, the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (also known as the Pinheiro principles); and the 1992 Rio Declaration on Environment and Development. Political or moral commitments made by States in voluntary agreements are another source of soft-law norms, such as the Paris Declaration on Aid Effectiveness; the Accra Agenda for Action; the Kimberley Process for the Certification of Rough Diamonds or the Principles of the Extractive Industries Transparency Initiative. Codes of conduct adopted by States but addressed to non-state actors are another source of soft-law principles, as are standards-setting instruments adopted by organs of international organizations or groups of independent experts. This includes the International Law Commission's "New Delhi Declaration of Principles of International Law Relating to Sustainable Development," and others.

E. Peace Agreements

Peace agreements are another source of norms principles for *jus post bellum*. Peace agreements can be difficult to define—there is no legal definition of "peace agreement" or "peace accord." For the purposes of this book, they are defined as documents that emerge from negotiated peace processes. They include pre-negotiation, framework, and implementation agreements. This can include treaty agreements between States, agreements between State and non-state actors, and agreements between domestic groups.[100]

For the purposes of jus post bellum, all forms of peace agreements are of use to indicate priorities and to shape the normative landscape of peacebuilding. In particular, there is a focus on constitutional peace agreements, or those peace agreements that form the basis for revised constitutions. Peace agreements provide a useful, if incomplete, indication of legal and

[99] For more detailed discussions of soft-law, see A. Boyle and C. Chinkin, *The Making of International Law* (OUP 2007); Dina Shelton, "International Law and "Relative Normality"" in Mark Evans (ed) *International Law* (3d ed, OUP 2010).

[100] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 47. It is debated whether peace agreements concluded between States and non-State actors constitute international law as such. See, e.g., P.H. Kooijmans, "The Security Council and Non-State Entities as Parties to Conflicts", in K. Wellens (ed.), International Law: Theory and Practice, Essays in Honour of Eric Suy (Kluwer Law International, 1998), 333, 338 (arguing that "The fact that it is concluded between a government and an insurrectionist party does not in itself detract from its international character. [...] If a settlement is reached which is co-signed by the Secretary-General's Representative, the non-state entity must be assumed not only to have committed itself to its counterpart, the Government but also to the United Nations."); Special Court for Sierra Leone, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chapter, 13 March 2004 paras 39, 86 (stating that "The role of the UN as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party" and finding that the Lomé peace agreement is not a treaty or an agreement in the nature of a treaty).

normative issues that are critical to fostering sustainable peace after conflict. Individual agreements as well as peace agreements as an aggregate body of documents can serve as guides or frameworks for substantive norms that shape the post-conflict state. Although the process of negotiation can limit these normative indicators, they are a starting point for developing a context-specific *jus post bellum* paradigmframework.

F. Policies and Practice

Policy statements and the practice of international and domestic peacebuilders are other sources of norms relevant to jus post bellum. This includes reports on lessons learned, good practices, NGO statements, domestic government policy initiatives, and other similar documents. One example is aid agreements between long-term donors and recipient governments. These agreements typically set out what both parties can expect from the aid arrangement, although they do not necessarily take a formally "legal" form. However, they may include specific targets for the government to reach in order to qualify for continuing aid, which may reflect international legal norms and values.[101]

Such policies and practices can indicate interpretive principles for jus post bellum. While these types of documents and statements do not create legal obligations, they do indicate the development of normative principles relevant to the peacebuilding context as well as the positions of governments and States on areas of law and practice relevant to jus post bellum. The practice of peacebuilders is yet another important consideration, as this is where the need for interpretation or divergence from international laws and norms may arise. Such policies and practices, through the process of norm diffusion,[102] can also form the basis of future international law.

III. Jus Post Bellum Dilemmas

The transition from conflict to peace is a complicated and delicate period. States, international interveners and individuals struggle to rebuild peaceful, resilient societies. There are numerous international laws that are applicable in the aftermath of war. However, the direct application of treaties, customary international law, or other norms and principles (with the exception of *jus cogens* norms) is often complicated by issues of peacebuilding priority, regime conflict with other areas of international law, and qualified deference. The following sections highlight some of the overarching dilemmas that permeate the application of jus post bellum norms.

A. Prioritization and Sequencing

How to prioritize and sequence peacebuilding concerns is an important dilemma for peacebuilders, and impacts the interpretation and application of relevant international law. This section discusses human rights law as an example, but the application of other bodies of law—such as environmental laws, property rights, or international criminal law—gives rise to similar challenges.

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[101] Matthew Saul, "The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone," (2012) 13 Melbourne Journal of International Law 540, 563.

[102] See, e.g., Martha Finnemore and Kathryn Sikkink, International Norm Dynamics and Political Change, 52 International Organization 887, 895 (1998).

With a multitude of competing priorities facing peacebuilders in the immediate aftermath of conflict, addressing past and preventing new human rights abuses might not be the most pressing concern. Peacebuilders' immediate concerns often focus on security; demobilization, disarmament, and reintegration of armed groups; criminal justice; and political stabilization, amongst others. Human rights, especially social and economic rights, are not often an immediate priority and are pushed back to be addressed later. For example, pursuing accountability for crimes against humanity and war crimes might be rapidly undertaken through international, hybrid, or domestic tribunals. However, the goal of providing justice to victims might not be fully realized if there is not a simultaneous focus on providing access to justice or fair trial rights at the local level. Affected populations may view the trials as benefiting the accused—who will have food and housing security—and an illegitimate expense while their rights are not being addressed.[103]

Even when human rights are a priority, there remain sequencing and priority challenges. Social and economic rights are often a lower priority than political and civil rights and are not often reflected in peace agreements.[104] When peace agreements do include social and economic rights, they have not generated the institutional and legal reform necessary for their implementation and guarantee.[105] This in turn creates capacity shortages for dealing with human rights abuses that arise during the peacebuilding phase. Guaranteeing social and economic rights can be resource intensive. Thus, for example, economic stabilization might be seen as a necessary precursor to a focus on these human rights. It could take years before these rights are addressed, during which time abuses might continue. This is problematic, as violations of social and economic rights during the peacebuilding phase can exacerbate the violations that occurred during or before the conflict, creating obstacles to a truly sustainable peace.[106]

This lack of prioritization of human rights in the jus post bellum context is incongruent with the preeminence of human rights in the global order. The emerging priority of human rights law reflects a shift in international law away from the importance of the State towards the primacy of the individual. This can be seen in developments in areas of law such as international criminal law, case law on the applicability of human rights law during times of armed conflict,[107] the advancement of fields such as transitional justice,[108] and the development of principles such as the Responsibility to Protect.[109]

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[103] See, e.g., Chinkin, "The Protection of Economic, Social and Cultural Rights Post-Conflict" (n 105) 8.
[104] They may be included under the rubric of humanitarian assistance rather than as rights per se.
[105] Christine Chinkin, The Protection of Economic, Social and Cultural Rights Post-Conflict, 7-8.
[106] Chinkin, "The Protection of Economic, Social and Cultural Rights Post-Conflict" (n 105) 4.
[107] See supra, notes 79 – 82 and related discussion; See also Isayeva v. Russia, Application No. 57950/00, Judgment, ECHR (2005), para 172 - 174; Abella v. Argentina, Case 11.137, Report No. 55/97, IACtHR OEA/Ser. L/v1695 Doc. Rev. at 271 (1997), paras 164 – 165; Avilan v. Colombia, Case 11.142, IACtHR OEA/Ser. L/V/II Doc. 6 Rev. (1998), para 140; Fuentes v. Colombia, Case 11.519 IACtHR OEA/Ser. L/V/II.95, Doc. 7 Rev. (1998), para 50; for an in-depth discussion of related jurisprudence, see Ruti Teitel, *Humanity's Law* (OUP 2011) 34 – 72.
[108] See, e.g., Ruti Teitel, Humanities Law (n 107).
[109] See infra, notes **Error! Bookmark not defined.** – **Error! Bookmark not defined.** and surrounding text.

B. Fragmentation & Overlap

A myriad of legal regimes apply during the transition from conflict to peace, leading to a risk of fragmentation. Fragmentation refers to the proliferation of various fields of law and institutions governing inter-state relations.[110] IHL, human rights law, refugee law, environmental law, development law, treaty laws, and a wide range of domestic laws frequently including new or revised constitutions may all apply at the same time and have overlapping areas of influence. Each of these areas of law carries specific value preferences and may compete over spheres of authority. For example, environmental protections could be viewed through an accountability lens, suggesting the application of international criminal law, or a human rights law lens, in addition to or instead of a purely environmental law perspective. A pure application of refugee law might conflict with property rights or human rights protections of some groups, such as women or minorities. The application of these different areas of law in the post-conflict context requires strategic choices, such as mainstreaming human rights in development or prioritizing security in peacebuilding.[111] Jus post bellum, as an interpretive framework, would help practitioners make an assessment between the various options. However, this is complicated and requires a nuanced evaluation—even if, for example, an analysis according to jus post bellum principles indicated he need to prioritize and mainstream human rights law, this might be difficult to achieve in practice.

Sometimes, legal regimes might seem to be in direct conflict with one another, such as IHL and human rights law. IHL allows for some derogations of human rights, but in the complicated immediate aftermath of a conflict, it might be unclear which body of law has primacy. The International Court of Justice (ICJ) has held that IHL and international human rights laws are not mutually exclusive and can apply simultaneously. The ICJ found that IHL and international human rights law are complementary, finding that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation […]."[112] In deciding exactly how the two may apply concurrently, the court found that:

> "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[113]

The jus post bellum context could give rise to situations where such a "mix" of IHL and international human rights law apply, especially in the early days of the transition when security

[110] Eyal Benvenisti, The Conception of International Law as a Legal System, (2008) 50 German Yearbook of International Law 393.
[111] Gallen, (n 1) at 61.
[112] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136 (July 9, 2004) [hereinafter "Wall Opinion"]. See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, para 25 (July 8, 1996).
[113] Wall Opinion, (n 112) at para 106. See also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda*), 2005 ICJ 4, para 216 (December 19, 2005) (upholding the Wall Opinion decision).

risks are higher. Jus post bellum represents the kinds of contexts where human rights protections may not be in and of themselves sufficient to meet the goals of sustainable peace, but where a "pure" application of IHL might lead to rights violations that similarly detract from the goal of attaining peace.

A majority decision by the Grand Chamber of the European Court of Human Rights (ECtHR) could help interpret and apply IHL in light of complementary human rights obligations. In *Hassan v. United Kingdom*, the ECtHR used a nuanced, case-by-case approach to understanding the relationship between IHL and international human rights law in international armed conflicts. In essence, the court reasoned that human rights obligations must be read in light of simultaneously applicable IHL.[114] Although this decision is limited to international armed conflicts, it paves the way for understanding how seemingly contrary legal regimes can be read together in complicated factual situations that arise in post-conflict contexts.

An additional challenge arises from the distinction between international and domestic responsibility for human rights protections. Leaving aside for the moment the complicated discussion of extraterritorial application of human rights law or its application to international organizations, it is domestic states that are responsible for ensuring the protection of human rights.[115] Domestic laws and institutions have to be accountable for human rights protection. International interlocutors thus need to balance their views and approaches to human rights with a context-specific and locally owned processes. Otherwise, projects risk being perceived as illegitimate and could be overturned or changed by future governments once international interveners depart. This requires international peacebuilders to find a careful balance between gaining the support and buy-in of domestic constituents, ensuring broad public participation, and at the same time ensuring that international human rights standards are upheld and protected by the domestic system. This may mean some rights—such as women's rights or environmental rights—cannot be addressed, at least not immediately post-conflict.

IV. Jus Post Bellum Principles

In the sections below, I will examine how three principles might help address some of the jus post bellum dilemmas posed by the application of international law during the transition from conflict to peace: the concepts of publicness and proportionality.

A. Publicness and Inclusion

Jus post bellum dilemmas, including the need to incorporate human rights protections and a focus on individuals while also respecting sovereignty, demonstrates the need for jus post bellum to adopt a broad, inter-public theory of international law that incorporates the principle of inclusion.[116] As Benedict Kingsbury states:

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[114] **Hassan v. the United Kingdom (application no. 29750/09) ECHR 936, para 104 (16 September 2014).**

[115] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 30.

[116] Benedict Kingsbury, "International Law as Inter-Public Law" in Henry R. Richardson and Melissa S. Williams (eds), *NOMOS XLIX: Moral Universalism and Pluralism* (New York University Press 2009) 170. Kingsbury argues that "adherence to a positivist conception of international law sourced in the will and consent of states may be the best way to maintain legal predictability and to sustain rule of law values in

> [T]he normative content of international law is immanent in the public quality of law in general and in the inter-public quality of international law. It emerges through the practice of seeking law-governed relationships rather than as a deduction from a priori principles of morality. The content that emerges through this repeated practice has general and recognizable features that function to constrain actors in their myriad interactions with one another. These regulative norms are identifiably present in multiplying sites of international and transnational decision-making. They appear whenever there is felt a demand for presenting decisions as non-arbitrary, as more than the result of power-inflected bargains between parties in a contractual arrangement.[117]

Kingsbury argues that law has a "distinct quality of publicness," in that it claims to "stand in the name of the whole society and speak to that whole society even when any particular rule may in fact be addressed to narrower groups."[118] This notion of publicness, Kingsbury argues, is increasingly part of and shaping international law.[119]

Jus post bellum also involves aspects of publicness, given its focus on sustainable peace and its transformative goals in post-conflict societies. Looking at the moral antecedents of a legal *jus post bellum*[120] we see a central focus in *jus post bellum* scholarship on creating a just society after war. Legal scholarship also reflects this inter-public dimension of *jus post bellum* when discussing the potential of *jus post bellum* laws to foster peace and promote justice and accountability[121] and in the use of the law or legal form to promote the legitimacy of peacebuilding decisions.[122] The concept of publicness shapes the law and practice of *jus post bellum* in important ways. *Jus post bellum* principles and goals "speak" in the name of the whole (global) society, and address entire post-conflict societies, even if the norms to which it applies are directed at specific groups (military, police, human rights organizations, judicial organs, etc.) or address the needs of a specific segment of society (women, minorities, armed groups, etc.). In this way, jus post bellum addresses the collective dimension of peacebuilding.

Applying the concept of publicness in jus post bellum could help peacebuilders take a broader view to the post-conflict challenges associated with the protection of human rights. It could help them see important but often overlooked links between human rights and other areas of law. It can drag peacebuilders out of their subject-matter silo to see how actions in one area of law or

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international relations. It may be preferable to retain a unified view of an international legal system than to countenance the deformalization and the mosaic pattern that some of the likely alternative approaches may entail. But I will argue that a theory of international law must be concerned with the normative production and the regulatory activities of such entities, at least when they exercise governing powers" (internal citations removed).

[117] Kingsbury, "International Law as Inter-Public Law" (n **Error! Bookmark not defined.**) 174.

[118] Kingsbury, "International Law as Inter-Public Law" (n **Error! Bookmark not defined.**) 174.

[119] Kingsbury, "International Law as Inter-Public Law" (n **Error! Bookmark not defined.**) 174.

[120] Mark Evans, "At War's End: Time to Turn to *Jus Post Bellum*?" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**).

[121] See e.g. Stahn, "Mapping the Discipline(s)" (n **Error! Bookmark not defined.**); Inger Österdahl and Esther van Zadel, "What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles" (2009) 14 *Journal of Conflict and Security* 175.

[122] Bell, *Lex Pacificatoria* (n **Error! Bookmark not defined.**) 144–161 (discussing the legal form of peace agreements).

peacebuilding practice can impact the society at large. The principle of publicness can also help peacebuilders find a balance between protecting individual rights and collective rights, or when derogations from human rights obligations might be necessary in order to facilitate the transition to sustainable peace. For example, by interpreting norms and actions according to the principle of publicness, peacebuilders who work to protect individual property rights would need to ensure that this does not violate collective rights—even if it means a derogation from the strict letter of the law regarding individual rights. It could also help them consider the impact of a program on excluded parts of society, such as women or minorities, whose inclusion in decision-making can help strengthen peacebuilding initiatives. Promoting great inclusiveness by adopting an inter-public view of jus post bellum could also strengthen the legitimacy of international interventions.

B. Proportionality

In the post-conflict phase, there are numerous competing priorities. Domestic and international peacebuilders have to decide how to sequence and structure any necessary reforms or programs. For example, establishing security; disarming, demobilizing, and reintegrating soldiers (DDR); and the return of refugees are often key immediate priorities. Legal and judicial reforms might also be an immediate priority, but some aspects, like stricter environmental protection laws, might be considered a second (or lower) tier priority. Similarly, the protection of human rights is often a key priority, but less so when it comes to socio-economic and cultural rights. Different actors might have different priorities, and there might be tensions between balancing short and long-term goals. An analysis or interpretation of norms based on the principle of proportionality is one methodology that might help decision makers balance these competing priorities.

There are many different manifestations of proportionality in different areas of law. For example, proportionality is an important concept in international humanitarian law (IHL). This military principle of proportionality provides that the amount of lethal destruction allowed in pursuing a military objective must be proportionate to the importance of the objective.[123] In international human rights law, proportionality helps determine the legality of derogations; the legality of interferences of the state with protected rights; and to determine the scope of some human rights.[124]

However, it can generally be defined as a test to ensure that a particular course of action will not cause more harm than the good it is intended to achieve.[125] This requires the decision-maker to measure and evaluate the weight of each interest and decide how the two competing interests balance out and whether the course of conduct is proportionate. This requires some

[123] Newton and May (n **Error! Bookmark not defined.**), 2.
[124] Newton and May (n **Error! Bookmark not defined.**), 57.
[125] See Michael Newton and Larry May, Proportionality in International Law (OUP 2014) 16 – 17.

commonality between the interests being compared,[126] and, at least before an arbitration body, a corresponding legal right.[127] Proportionality as a legal test requires:

1. A causal relationship between the measure and its objective, which ensures that the course of action is suitable for its intended objective;
2. Necessity, in that the intended objective cannot be achieved by any less-restrictive alternative means; and
3. Proportionality *stricto sensu*, in that the effects of the measure are not disproportionate or excessive in relation to other affected interests.[128]

Larry May proposes two proportionality principles tailored to the jus post bellum context, a domestic version and an international version. Below I have condensed them into one:

> "Whatever is required by the application of other normative principles of *jus post bellum* must not impose more harm on the population of a party to a war [or the peoples of the world] than the harm that is alleviated by the application of these other post war principles."[129]

The focus of this principle is on the conditions necessary for achieving sustainable peace: "they cannot impose more harm on a population than the harm that is alleviated by these post war plans."[130] It is thus broader than other concepts of proportionality, in that it looks at the post-conflict context as a whole as opposed to specific areas of law.

As with all applications of proportionality, there is an inherent difficulty in determining the outcome of a course of action and assigning and comparing its potential effects. With the myriad interests at play in the transition to peace, it may seem that there are too many interests to weigh to make this test practical. This can be particularly difficult in the politically-charged, delicate, and tense situation immediate after a conflict when parties with competing needs and ideas are trying to work collectively on peacebuilding. A proportionality test also requires a common understanding of "harm." The overall goal of jus post bellum is to foster a transition to a just and sustainable peace—it is forward looking, and is not aimed at returning to the status quo ante. This could be the measure of "harm" against which two interests are balanced—a jus post bellum proportionality test would require that any course of action must not defeat the objective of a just and sustainable peace. In short, deciding what exactly to balance, dealing with

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[126] Başak Cali, "Balancing Human Rights? Methodological Problems with Weights Scales and Proportions" (2007) 29 Human Rights Quarterly 251, 257).

[127] Edward Guntrip, "International Human Rights Law, Investment Arbitration and Proportionality Analysis: Panacea or Pandora's Box?" EJIL: Talk! January 7, 2014, available at http://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/ (accessed June 4, 2014).

[128] Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," IILJ Working Paper 2009/6 (2009) 21 – 22.

[129] Larry May, *After War Ends* (CUP 2012) 304. Although May argues that because the principles have different addressees they should be treated as distinct, for the purposes of this article they can be treated singularly.

[130] May, *After Ear Ends* (n **Error! Bookmark not defined.**) 303. See Brian Orend, "Jus Post Bellum: A Just War Theory Perspective," in Stahn and Kleffner, (n **Error! Bookmark not defined.**) 40.

the changing reality of post-conflict situations, and understanding the different types of harms to be avoided makes a jus post bellum proportionality analysis complicated.

However, this principle can still help guide decision-makers towards actions that will contribute holistically to sustainable peace and avoid siloed decisions. For example, post-conflict states are often in severe need of fast sources of revenue. In some cases, this might lead to a decision to prioritize attracting investments or utilizing natural resources. The project might have environmental consequences that will lead to soil erosion or pollution, land grabs, contests over property rights, and a reduction in the source of a community's livelihood. These can all exacerbate existing human rights violations or create new violations, or even lead to a resurgence of the conflict.[131] Other examples could include the distribution of political posts along ethnic lines, lustration, or accountability mechanisms. The requirement of analyzing and measuring potential outcomes and determining their value in proportion to the proposed project can help decision-makers better understand the post-conflict context, conflict drivers, and the consequences of their actions. Even if these are not precise evaluations, they can still contribute overall to a more holistic and balanced *jus post bellum* and help solve some of the dilemmas of prioritization and human rights protection.

C. Qualified Deference

There is a clear need to balance the need for rights protection and sovereignty during the peacebuilding phase—but how, in practice, should interveners accomplish this? International interlocutors involved in peacebuilding processes need to maintain flexibility and to allow for national diversity and pluralism. Deference to national interests and normative values is often critical to ensuring the successful negotiation and implementation of peace agreements as well as inclusive peacebuilding. However, considering the challenges associated with trusteeship and sovereignty discussed above, deference in this context should be "qualified" or "bounded," as opposed to complete. Qualified deference is a better normative concept to apply when internationals intervene in post-conflict situations. Applying the principle of "qualified deference" to jus post bellum can both ensure the protection of fundamental values in international law as well as help foster national rule of law in post-conflict states.[132]

Two related concepts have been put forth by Kristen Boon and Mark Drumbl. Relying on the notions of subsidiarity and margin of appreciation, Kristen Boon argues that the concept of "bounded discretion" should be applied during the transition from conflict to peace in non-

[131] For more on this, see Chapter 6.

[132] The peace process in Afghanistan is a good example of why deference should be qualified or bounded. See Marieke Wierda, "The Positive Role of International Law in Peace Negotiations: Implementing Transitional Justice in Afghanistan and Uganda" 281 in Morten Bergsmo and Pablo Kalmanovitz (eds) *Law in Peace Negotiations* (2d ed, FICHL Publication Series No. 5 2010) 281. The debate about amnesties is also a useful example of how "bounded" discretion is important. See, e.g., Claus Kreß and Leena Grover, "International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character" in Morten Bergsmo and Pablo Kalmanovitz (eds) *Law in Peace Negotiations* (2d ed, FICHL Publication Series No. 5 2010) (arguing that there are limited exceptions to a customary international law duty to prosecute grave international crimes); and "The Belfast Guidelines on Amnesty and Accountability" (Transitional Justice Institute at the University of Ulster 2013) 9, 10, and 13, available at http://transitionaljustice.ulster.ac.uk/documents/TheBelfastGuidelinesonAmnestyandAccountability.pdf accessed 1 April 2014,.

international armed conflicts where there is less direct application of international treaty law. She argues that this concept would allow for the development of norms that accommodate a role for non-state actors in post-conflict situations. Providing a degree of freedom in approaches to peacebuilding would allow for context-specific and culturally relevant post-conflict constitutional orders.[133] It would also better protect the values of self-determination and accountability, which are critical to jus post bellum, while ensuring adherence to non-negotiable rules of international law.

In exploring domestic accountability process for international crimes, Mark Drumbl argues in favor of applying "qualified deference":

> Qualified deference does not involve a blind retreat to national or local institutions. Such a retreat would be problematic. In some postconflict societies, juridical institutions are devastated, illegitimate, corrupt, manipulable, complicit in violence, or in the service of repressive social control; not all postconflict societies move toward democracy or peace, some trend in the direction of authoritarianism; some postconflict societies look more like societies between conflicts. [...] [Q]ualified deference meets important utilitarian objectives in promoting legitimacy [...] and in minimizing unrealistic expectations of local legitimacy upon which subsidiarity is predicated.[134]

Based on Drumbl's analysis, jus post bellum can rely on a number of indicia to evaluate whether a local initiative or institution should be shown deference or not. These include: good faith; the democratic legitimacy of the national initiative; the specific characteristics of the conflict and the current political context; the effect of the state's initiative on universal substantive norms; and the protection of human rights.

Utilizing such a "qualified deference" test for jus post bellum might better foster sustainable peace and the rule of law.[135] "Qualified deference" allocates authority over peace agreements and legal norms to domestic authorities. However, it does not allow for derogation from certain fundamental norms and protects against the subversion of international norms by domestic elites in the implementation of the agreements and laws.[136] It allows for post-conflict legal reforms that will be credible and enforceable in the specific contexts appropriate for diverse communities. Based on the concepts of the margin of appreciation[137] and subsidiarity,[138]

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[133] Kristen Boon, "The Application of *Jus Post Bellum* in Non-International Armed Conflicts" in Stahn et al., Jus Post Bellum (n **Error! Bookmark not defined.**) 259.

[134] Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 188–89.

[135] Drumbl, *Atrocity, Punishment, and International Law* (n **Error! Bookmark not defined.**) 189.

[136] See, e.g., Eyal Benvenisti, supra note **Error! Bookmark not defined.**.

[137] The margin of appreciation is a legal doctrine based on the idea that "each society is entitled to a certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions." Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998) 31 *New York University Journal of International Law and Politics* 843.

[138] Subsidiarity is based on the notion of multi-level governance and managing the appropriate level of governance to be used in the exercise of particular powers. Subsidiarity favors the most local level of governance possible in achieving a particular governmental purpose. See, e.g., George A. Bermann "Taking Subsidiarity Seriously: Federalism in the European Union and United States" (1994) 94 Colombia Law Review 331, 343.

qualified deference could help mitigate tensions over "imposed" international norms and the vertical relationship between international and national law. It reduces the democratic deficit that arises with intensive international influence over national constitutions, institutional development and in situations of "trusteeship" or international administration.[139]

V. Conclusion

This paper has laid out some of the core fields of law that are relevant to jus post bellum. As discussed above, jus post bellum encompasses a wide body of international law from various fields, such as human rights, international environmental law, general public international law, and others. Peacebuilding practice involves various sources of law, including "hard" law such as treaties and customary international law, as well as "soft" law, such as non-binding declarations made by international organizations or treaty bodies and codes of conduct adopted by States and directed towards non-State actors. Also relevant are "extra-legal" sources of norms such as UNSC resolutions, peace agreements, policies of international organizations and aid agencies. Application of these laws and norms during the transition from conflict to peace raises a number of cross-cutting dilemmas. For example, how can states meet their human rights obligations when state institutions have been decimated by conflict? How can peacebuilding initiatives best protect long-term human rights priorities while addressing short-term concerns such as establishing a peace agreement or maintaining security? How can the acts of international organizations and foreign interveners protect both the rights of self-determination and sovereignty? Do decisions made through non-inclusive or non-consultative processes violate these rights? This paper argued that jus post bellum can operate as an interpretive framework providing principles that can be used to interpret and apply various substantive norms to best manage these dilemmas. These interpretive norms include the concepts of publicness, qualified deference and proportionality.

[139] See, e.g., George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Union and United States" (1994) 94 *Columbia Law Review* 331, 343.